No. 88-1427 (2)

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In The

Supreme Court of the United States

October Term, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

FRANK MEAGHER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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LIST OF PARTIES

The parties to the preceeding below were the Petitioners, the International Association of Machinists and Aerospace Workers Pension Plan, William Winpisinger, Eugene Glover and George Kourpias as fiduciaries and trustees of the International Association of Machinists and Aerospace Workers Pension Plan, and the Respondent, Frank Meagher.

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INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 856 F.2d 1418. The opinion and judgment of the District Court for the Northern District of California is unreported. Both opinions, as well as the appellate court's unreported denial of rehearing, are reproduced in the appendix to Petitioners' Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The following provisions of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq., are pertinent to this matter.

ERISA Section 204(g), 29 U.S.C. § 1054(g);
ERISA Section 302(c)(8), 29 U.S.C. § 1082(c)(8);
ERISA Section 413, 29 U.S.C. § 1113;
ERISA Section 502(a), 29 U.S.C. § 1132(a)

The texts of these provisions are set forth in the statutory appendix bound with petitioners' petition at pp. 24a-26a.

STATEMENT OF THE CASE

Respondent Frank Meagher was, from late 1956 until his retirement on July 1, 1977, a member and officer of the International Association of Machinists and Aerospace Workers ("IAM"), and during such period of twenty years and seven months, was a participant in and prospective beneficiary of Petitioner International Association of Machinists and Aerospace Workers Pension Plan ("the Plan"). The Plan, as an employer, administered an employee pension plan for its officers, organizers and support staff. The Plan contained a "living pension" feature that increased the monthly benefit payments proportionately to any future salary increases of the position from which the pensioner had retired.

An amendment to the Plan was proposed in September, 1976 by the delegates to that year's IAM convention which had the effect of phasing out the "living pension" feature. The phase-out was scheduled to commence on

January 1, 1979 and continue until the entire living pension feature was eliminated by January 1, 1985.

Shortly after the implementation of the phase-out, in February, 1979, the Plan's trustees sent a letter to all retirees explaining the effect of the amendment upon their benefits. Eight months later, in October, 1979, the trustees sent a second series of documents, consisting of a document entitled "Summary Plan Description" to all Plan participants, describing how the living pension feature was being phased-out. The cover letter stated that the Pension Plan had "been revised to comply with the Employee Retirement Income Security Act of 1974 (ERISA) . . . ", and that the Plan had been amended "to comply with ERISA".

Edward Shaw, a Plan participant and a union retiree, filed a class action suit on December 1, 1981 in Federal District Court against the Plan and its trustees, challenging the application of the amendment phasing out the living pension. The class, certified by the court, consisted of Shaw and other retirees who had retired on or before January 1, 1977. The *Shaw* litigation resulted in a declaratory judgment for plaintiff Shaw on May 9, 1983 in *Shaw v. IAM and A.W. Pension Plan*, 563 F.Supp. 653 (C.D. Cal. 1983). The District Court's decision was affirmed by the Ninth Circuit Court of Appeals on January 11, 1985 in the decision entitled *Shaw v. International Association of Machinists and Aerospace Workers' Pension Plan*, 750 F.2d 1458, 1459-60 (9th Cir. 1985), and the Plan's petition for a Writ of Certiorari was denied by the Supreme Court on June 3, 1985 and reported in 471 U.S. 1137 [105 S.Ct. 2678] (1985).

Following the affirmance of the Ninth Circuit Court of Appeals, the parties to *Shaw* submitted, on their own initiative, a stipulated program for compliance with the District Court's decision. The parties to the stipulation agreed to apply prospectively the living pension feature to all participants who, like Shaw, had retired prior to January 1, 1977, and to also reimburse those retirees for the past adjustments they were entitled to but did not receive. The parties further agreed that these measures would be taken with respect to the pre-January 1, 1977 retirees only, presumably because only these individuals were the class of litigants in *Shaw*. The District Court was then requested to confirm the essential portions of the program of compliance, which it did by issuing an order outlining the program.

On February 14, 1986, the Plan trustees disclosed the result of the *Shaw* litigation for the first time to Plan beneficiaries. In a Letter on that date, the Plan trustees advised all Plan participants that "the judgment applies only to pensioners who retired before January 1, 1977, and their beneficiaries". Respondent Meagher, within ten days of his receipt of this letter, sent a letter to one of the trustees asking why the *Shaw* judgment did not also apply to him. The trustees' responsive letter provided no additional information other than that previously set forth in the February 14, 1986 letter.

On May 13, 1986, Respondent Meagher filed a complaint in Federal District Court, claiming that the application of the amendment to reduce his living pension accrued benefits was a violation of Section 1054(g)(1) of ERISA, as determined by the decision of the court in the *Shaw* case. Respondent's complaint further alleged that

the adoption of the amendment to the Pension Plan was a breach of the fiduciary duty petitioners owed to respondent and that the amendment violated the provisions of 29 U.S.C. § 1054(g) as determined by *Shaw*. Respondent therefore sought a declaratory judgment that the application of the amendment was a violation of ERISA and sought an order directing the Plan to pay to respondent the amount of money in pension benefits he would have received without application of the amendment to the Plan.

The answer to the complaint filed by the Plan denied that the amendment, as applied to respondent, violated ERISA. Affirmative defenses were also alleged, including that the action was barred by the applicable statute of limitations; that respondent was equitably estopped from bringing the action based on his alleged support of the phase-out; and that respondent had failed to exhaust available internal union remedies.

Cross-motions for summary judgment were filed, with petitioners seeking summary judgment on the issue of the statute of limitations and respondent seeking summary judgment in his favor on the merits.

On May 22, 1987, the United States District Court for the Northern District of California (by the Honorable Samuel J. Conti) granted the petitioners' motion for summary judgment on the issue of the statute of limitations and denied respondent's motion for summary judgment. Judge Conti cited the decision of the Ninth Circuit in *Blanton v. Anzalone*, 760 F.2d 989, 992 (1985), as controlling authority for his finding that respondent had knowledge in mid-October, 1979 of the events which would give rise

to his cause of action, and that a six year statute of limitations was triggered at that time. The court therefore found that respondent's time for filing a complaint expired in October of 1985, approximately seven months before he filed his complaint.

Respondent timely appealed from the District Court's decision to the United States Court of Appeals for the Ninth Circuit. In an opinion dated September 12, 1988, the Ninth Circuit reversed the judgment of the District Court.

The decision of the Court of Appeals rested squarely on its finding that the Plan trustees, despite the clear holding of the Ninth Circuit Court of Appeals in *Shaw, supra,* had continued to breach their fiduciary duty to respondent by failing and refusing to either bring the proposed amendment into compliance with ERISA, or abandon the amendment and restore to all Plan participants the living pension features which the proposed Plan amendment phased out. Based on its finding that the decision in *Shaw* was equally applicable to respondent's case, the Court of Appeals next addressed the applicable statute of limitations which would affect the amount of benefits respondent was entitled to.

The Court of Appeals, noting the inappropriateness of the District Court's use of the six year statute of limitations set forth in 29 U.S.C. § 1113(a)(1), applied the three-year statute of limitations period set forth in 29 U.S.C. § 1113(a)(2). Accordingly, the Court held that the limitations period dated three years from respondent's receipt of each benefit check. Based on the filing date of the action on May 13, 1986, the Court calculated three

years back and held that respondent's claims were timely for all checks issued since May 13, 1983. In so doing, the Court eliminated from recovery all benefit checks respondent received from the date of the implementation of the reduction of the living pension benefits until the May 13, 1983 limitations period commencement date.

Appellant petitioned for rehearing with suggestion for *en banc* review, and on December 1, 1988 the petition for rehearing was denied and the suggestion for a rehearing *en banc* was rejected. By timely petition filed on March 1, 1989, petitioners filed their Petition for Writ of Certiorari to the United States Court of Appeals, Ninth Circuit.

REASONS FOR DENYING THE WRIT

The instant decision of the Ninth Circuit, reaffirming its decision in *Shaw* and unequivocally ruling that the Plan amendment reduced accrued benefits and was, and still is inoperative until approved by the Secretary of the Treasury is a decision which brings to an end the inequitable and unauthorized activity of the Plan in denying benefits to one class of Plan participants solely on the grounds that they were not members of the *Shaw* class of litigants. The application of the three-year statute of limitations set forth in 29 U.S.C. § 1113(a)(2) to respondent's complaint is, contrary to petitioner's attempt to confer great importance on this application, ancillary to the principal holding of the Court of Appeals.

The Ninth Circuit's ruling in this matter is not in conflict with the rulings of any other circuits and, contrary to the strident "doomsday" assertions of petitioners, the decision will have no adverse impact on the administration of employee benefit plans throughout the United States. On the contrary, the Court's decision clarifies for Plan administrators their fiduciary responsibility to Plan participants to comply with the provisions of ERISA with respect to any proposed Plan amendments.

The Court's decision further preserves for Plan participants the right to challenge illegal or unauthorized amendments, but limits the recovery participants can obtain through such challenges to the constraints imposed by the applicable statute of limitations. The limitation of recovery to the three or six year statutory time period precludes the dire consequences predicated by petitioners, while at the same time discourages Pension Plan administrators from adopting illegal or unauthorized amendments and, three to six years after the adoption of those amendments, barring any future claims by pensioners whose rights may not have vested during the initial three to six years of the unauthorized amendment's operation.

I. THE PLAN TRUSTEES, IN THIS PETITION, HAVE MISCHARACTERIZED THE GRAVAMEN OF THE NINTH CIRCUIT COURT OF APPEALS DECISION, AND HAVE ATTEMPTED TO SHIFT THE FOCUS OF REVIEW FROM THE TRUSTEES' CONTINUED VIOLATION, DESPITE THE NINTH CIRCUIT DECISION IN *SHAW*, OF ERISA REQUIREMENTS FOR PENSION PLAN AMENDMENTS THAT REDUCE ACCRUED BENEFITS, TO THE ANCILLARY ISSUE OF THE STATUTE OF LIMITATIONS.

The arguments set forth by petitioners are rife with mischaracterizations of the facts of the case before the lower court, the applicable law, and the intent of the ruling of the lower court.

Petitioners argue that the Ninth Circuit Court's ruling that a cause of action seeking employee benefits pursuant to ERISA accrues each time a benefit check is issued "that fails to include the full amount claimed to be due . . . effectively has eliminated as a defense against such claims the running of the statute of limitations." (Petition at page 11.) Petitioners further assert: "By so ruling, the Court has spurned the fundamental concept of American jurisprudence that a plaintiff be diligent in the prosecution of a complaint or face the consequence of a time bar." *Id.* Petitioners assert that this ruling, as they have described it, conflicts with the rulings of other circuits on the issue of when an ERISA cause of action accrues and on the question of which statute of limitations is appropriately applied to ERISA founded benefit claims. (Petition at page 12).

Petitioners next cite an extensive string of cases which petitioners claim are decisions of other circuit

courts of appeals which are in conflict with the Ninth Circuit decision and which stand for the proposition that a plaintiff accrues a cause of action to obtain employee benefits when that plaintiff first learns that a Plan decision has been made that unambiguously and irrevocably has affected his benefit interests. (Petition at page 15).

This analysis, which is the foundation of the Plan's petition, is misleading in that it fails to address the single most salient distinction between the case at bar and any of the cases cited in support of the petition. This distinction is the fact that the proposed amendment was never legally adopted, and the issue of the legality of the challenged amendment to the Plan had already been determined in the *Shaw* litigation. Despite that fact, the trustees continued to refuse to pay respondent's benefits. That course of conduct by the Trustees constituted a continuing breach of petitioners' fiduciary responsibilities to respondent.

In discussing the basis for its decision in *Shaw*, the Ninth Circuit, in the Opinion which is the subject of the instant petition, reiterated its finding that the Plan had not met the criteria for the valid adoption of an amendment due to its failure to obtain the approval of the Secretary of the Treasury, as is required by 29 U.S.C. Section 1082(c)(8) (1982). This approval is required for all amendments which decrease accrued benefits; such amendments can only be adopted by a Plan if they are "necessary because of a substantial business hardship." *Id.* The Ninth Circuit noted further that "the trustees had not obtained the Secretary's approval by the time of the *Shaw* case, nor have they obtained it since." Based on the failure of the Plan to obtain this approval of the Secretary,

the Ninth Circuit Opinion concluded "[u]nder the plain language of Section 1082(c)(8), 'no amendment . . . which reduces the accrued benefits of *any* participant *shall take effect'* unless the Secretary approves it." (*Emphasis added*). Based on this analysis, the Ninth Circuit Court of Appeals reached the following conclusion with respect to the instant case: "The amendment is simply inoperative, and the Plan must be administered without giving any effect to the amendment". (Petitioner's Appendix, pp. 4a-5a.)

It is the failure of the Plan trustees to accept and adopt the ruling of the Court in *Shaw* which gives rise to the determination that claims can still be asserted for damages arising from that denial of benefits. As the Court notes in footnote 3 of its decision, discussing the limitations of the order signed by the District Court in the *Shaw* litigation, the limitations contained within that order are not binding on the Ninth Circuit Court of Appeals.

> "The order states that the remedy is limited to the *Shaw* litigants. This is not surprising. The order could apply only to those litigants before the court in that case. *That the effect of the order was limited, however, certainly does not mean that the effect of our decision was so limited."*

Petition at 6a, fn.3, *emphasis added.*

In the paragraph in which the Court first asserts its ruling that each check issued to respondent in amounts reduced under the inoperative Plan amendment constitutes a fresh breach by the trustees which gives rise to a separate cause of action, the Ninth Circuit prefaces that

ruling by reiterating the significance of the trustees blatant refusal to apply the Court's decision in *Shaw* to all pensioners.

> "Despite our holding in *Shaw*, the trustees have continued to apply the inoperative amendment to all but *Shaw* litigants. This is a denial of benefits to which Meagher was, and will become entitled and with respect to which he seeks 'to recover . . . [and] to enforce his rights under the terms of the Plan . . . ,' 29 U.S.C. § 1132(a)(1)(b)".

Petitioners' Appendix at p. 9a.

Again, in its conclusion, the Ninth Circuit's Opinion reasserts the significance the trustees' violation of *Shaw* has on the Court's decision in the instant case.

> "In *Shaw*, we held that the amendment to the pension plan reduced accrued benefits and was inoperative until approved by the Secretary of the Treasury. No approval has since been obtained, and we hold that the amendment remains inoperative to all participants. Meagher's action for recovery of benefits is timely as to all benefits withheld since May 13, 1983, and as to the declaration of future benefits."

Petitioners' Appendix at p. 11a.

Petitioners characterize the logic of the Ninth Circuit Court of Appeals' Opinion with respect to the issuance of each reduced employee benefit check as a "wrongful application" of the Plan, as a "strained reading of ERISA", and based "on a logical non-sequiter". (Petition at 14, fn.16.) This is another mischaracterization of the decision and its underlying logic, both of which are clear and unambiguous. The Ninth Circuit's Opinion states that the proposed Plan amendment was invalid and inoperative in 1977 when it was initially proposed, in 1979

when it was implemented, in 1983 when the District Court so ruled in the *Shaw* case, in 1985 when the Court of Appeals affirmed the District Court's decision in *Shaw*, and that it remains invalid today. Since the proposed Plan amendment has *never* been valid or operative, it cannot be the cause of the harm done to respondent. Only the applications of this invalid and inoperative amendment could give rise to a claim, and each such application gives rise to a separate claim. (Petitioners' Appendix at 8a).

As the Ninth Circuit panel noted in its decision, the failure to comply with the ERISA requirement for approval by the Secretary of the Treasury means that the amendment did not take effect. The Court was therefore compelled to treat respondent's claim for benefits as one for a reduction of benefit checks without any basis for that reduction. Accordingly, the only issue left before the Court was the determination of the appropriate statute of limitations to determine the degree to which the Court would be entitled to go back and award benefits to respondent.

No case cited by Petitioners in its petition supports the proposition that the trustees of a pension plan governed by ERISA can propose an amendment, put it into effect without complying with ERISA, and then make that inoperative amendment binding against plan participants by virtue of the limitations period set forth in 29 U.S.C. Section 1113. No such case is cited by petitioners because no such case exists. The cases cited in the petition at pages 15-20 have no bearing on the case at bar as they do not involve the fact situation outlined above, and these decisions will in no way be adversely affected by this Court's denial of the instant petition.

Petitioners further mischaracterize the facts of this case when they argue that the Ninth Circuit is "confusing an action (the adoption or implementation of the disputed phase-out amendment) with its ministerial consequences (reduced pension checks)." (Petition at 23.) Petitioners further assert, in footnote 22, that "once a decision concerning a participant's benefits is made, the Plan's subsequent dealings with him are purely ministerial." *Id.*

It is the Petitioners, and not the Ninth Circuit Court of Appeals, who appear to be confused about the circumstances of this case. After proposing an invalid and inoperative Plan amendment in 1977, the trustees put that amendment into effect in 1979 and began reducing pension checks. After losing the challenge to the validity of the amendment in *Shaw, supra,* in 1983, the trustees vigorously opposed that District Court decision in the Ninth Circuit Court of Appeals, lost again, and petitioned this Court for certiorari, which was denied in 1985.

Following that denial and the creation of the stipulated plan for compliance with *Shaw,* the trustees then took the affirmative action of communicating with all Plan participants and advising those participants that the trustees were going to create two new and separate classes of pension recipients: the *Shaw* class of participants, who would continue to receive the living pension benefits in the future and who would be reimbursed for benefits not paid pursuant to that feature between 1979 and 1986, and all non-*Shaw* class participants, as to whom the Plan would continue to enforce the proposed amendment held invalid and inoperative by the Court in *Shaw.*

The decision to continue to withhold living pension benefits to non-*Shaw* litigation participants was not a ministerial act. It is not a decision made by computer. This decision involved far more than the printing of checks, and, in fact, evidenced a blatant disregard for the clear ruling of the Ninth Circuit Court of Appeals, which remained undisturbed by this Court, that the proposed Plan amendment was invalid, inoperative, and not binding on the participants in the Plan. There is nothing ministerial about this decision and the perpetuation of this wrongful decision has now been unequivocally rejected by the Ninth Circuit's Opinion.

One final mischaracterization by Petitioners of the facts of this case needs clarification. The petition, at pages 20-21, asserts that respondent Meagher was "fully aware from the outset that his benefit interest had been affected adversely by the 1977 amendment. . . . It is clear that he could have brought suit against the Plan as early as 1977. Certainly, Meagher could have done so, as the District Court noted, by the fall of 1979, when the Plan's summary descriptions were issued. By the issuance of those documents, the Trustees unequivocally renounced the future payment of 'living pension' adjustments. Meagher, instead, chose to wait more than nine years before pursuing his claim." *Id.*

What is missing from this description of the facts is a fact supplied by the Ninth Circuit Court of Appeals summary of the background of this case, as follows:

> "In October, 1979, the trustees sent Summary Plan Descriptions to all Plan participants, describing how the living pension feature was phased out. The cover

> letter stated that the Plan had been qualified by the IRS and had been revised to comply with [ERISA]."

Petitioners' Appendix at p. 3a.

Frank Meagher did not choose to wait nine years before bringing his action against the Plan. On the contrary, he refrained from filing a suit in reliance upon the representation by the Board of Trustees of the Plan that the Plan had been adopted in compliance with ERISA. As has been noted previously, this representation was false. Respondent Meagher only learned the truth of this representation in February, 1986 when the Plan first advised him and other Plan participants of the outcome of the *Shaw* litigation. To propose that respondent Frank Meagher spent nine years of his retirement willingly accepting seriously reduced pension benefits with full knowledge that he could challenge the Plan amendment which reduced those benefits is a gross mischaracterization of the facts of this case.

II. PETITIONERS' CHOICE OF LAW ARGUMENT WITH RESPECT TO THE APPLICABLE STATUTE OF LIMITATIONS IS, BY PETITIONERS' OWN ADMISSION, IRRELEVANT, AND IS ALSO MISDIRECTED, AS RESPONDENT MEAGHER'S CASE IS ONE FOR BENEFITS ARISING FROM A BREACH OF FIDUCIARY DUTY, AND THEREFORE SQUARELY WITHIN THE AMBIT OF ERISA SECTION 413.

Petitioners argue, at pages 23-25, that the Ninth Circuit Court of Appeals' decision to apply the three/six year limitations period set forth in ERISA Section 413 was

erroneous because other circuits have applied state limitations periods applicable to actions to enforce written contracts to employee benefit disputes. (Petition at 23-24.) Petitioners admit, however, that "it cannot be said that the final outcome of the instant litigation will turn on the issue of which of the arguably appropriate statutes of limitations should have been applied by the court below . . . ". Based on this admission, respondent requests that the Court deem this section of the petition as surplussage and disregard it.

Further basis to disregard this argument is that the complaint filed by respondent Meagher in the District Court was clearly one for damages arising from a breach of the fiduciary obligations of the trustees. (Petitioners' Appendix at 22a, paragraph 10.) The opinion of the Ninth Circuit Court of Appeals also states that the action of the trustees in issuing reduced benefit checks to respondent constituted a breach of their fiduciary obligation to him.

> "ERISA charges the trustees and fiduciaries with the duty to administer the pension plan 'in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with the provisions of [ERISA]'. 29 U.S.C. § 1104(a)(1)(d) (1982)."
>
> . . .
>
> "Each check issued to him an amount reduced under the inoperative amendment constitutes a fresh breach by the trustees of their duty to administer the pension plan in accordance with the documents and instruments of the Plan that are not inconsistent with

ERISA, as required by 29 U.S.C. section 1104(a)(1)(d)."

Petitioners' Appendix at 9a.

Based on the Ninth Circuit's finding, pursuant to its authority to conduct a *de novo* review of the proceedings in the trial court (*See, e.g., Darring v. Kincheloe,* 783 F.2d 874, 876 (9th Cir. 1986), that the actions of the Plan trustees constituted a breach of their fiduciary duties to respondent, the applicable statute of limitations is the six/three year provisions of 29 U.S.C. Section 1113, ERISA Section 413, and its application in the Opinion of the lower court provides no basis for valid argument by Petitioners.

III. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN THE CASE AT BAR WILL NOT SERIOUSLY ADVERSELY IMPACT EMPLOYEE BENEFIT PLAN ADMINISTRATION OR UNDERMINE THE BENEFIT SECURITY OF PLAN PARTICIPANTS.

Petitioners' concluding argument, at pages 26-28, is a "doomsday" prediction that what Petitioners term the "continuing violation" concept they assert is announced by the Ninth Circuit Court of Appeals' decision will create tremendous uncertainty among employee benefit plan administrators regarding the viability of decisions relating to basic plan design issues, and will cause injury to Plan participants resulting from underfunding caused by the "belated nullification of a critical plan rule". (Petition at 27.) *Nothing* in the Ninth Circuit's Opinion will cause these dire results, and on the contrary, the Opinion

supports and reaffirms the legislatively determined appropriate limitations period for claims against plan administrators for breaches of fiduciary duty, as provided in 29 U.S.C. Section 1113.

It is only Plan trustees who implement proposed Plan amendments without meeting a clear condition precedent to adoption of such an amendment under ERISA, such as approval by the Secretary of the Treasury, and who then persist in the application of that proposed amendment despite adverse court ruling, who can expect to suffer financial consequences from such a course of action. While these consequences may be dire, a consideration of the harm done to Plan participants if petitioners' interpretation of the law is accepted will fully justify any harm suffered by the pension Plan in the case at bar.

If petitioners' argument in this case is correct, pension plans which propose illegal or unauthorized amendments to their benefit plans, and represent to their participants that those proposed amendments comply with ERISA, may, by lulling the participants' concerns over the validity of the amendments for three to six years, be able to circumvent the requirements of ERISA and preclude any subsequent plan participants, including those whose rights were not vested as of the date of the implementation of the unauthorized amendment, from ever challenging the validity or legality of that amendment. It is this result which the Ninth Circuit's decision prevents, while still applying the appropriate statute of limitations to valid claims challenging such unauthorized amendments.

Petitioners' argument that the Ninth Circuit decision spurns "the fundamental concept of American jurisprudence that a plaintiff be diligent in the prosecution of a complaint or face the consequence of a time bar" (Petition at 11), fails to acknowledge the serious consequences imposed by the statute of limitations, as interpreted by the Ninth Circuit, on respondent's claim. Respondent Frank Meagher, in his complaint, sought to recover all benefits pursuant to the living pension feature of his pension from 1979 through 1986, and thereafter. The Court of Appeals decision, limiting his cause of action to recovery of benefit checks reduced without authority from May 13, 1983 and thereafter, bars respondent Meagher from recovery of more than four years of improperly reduced benefit checks. The serious consequences of the statute of limitations on such ERISA claims is clearly reaffirmed by the Court's decision and Plan participants who wait years, or even decades, to file their claims will be forced to sacrifice benefits they might otherwise have been entitled to had they filed their claims at an earlier date. The Ninth Circuit Court of Appeals' decision will therefore have the salutory effect of encouraging the timely filing of claims, while at the same time precluding pension Plan administrators from using the statute of limitations as a shield to bar valid claims from being prosecuted.

IV. CONCLUSION

The requirements of ERISA provide fair and equitable guidelines for the amendment of pension plans. In particular, the requirement that approval be obtained from the Secretary of the Treasury for any amendments to

pension plans which reduce accrued benefits, and that such approval be granted only if the Secretary determines that the amendment is "necessary because of a substantial business hardship", (29 U.S.C. § 1082(c)(8) (1982)), is a requirement which guarantees that the drastic impact on plan participants resulting from reduction of accrued benefits is only implemented in the most serious of cases. In the case at bar, the Plan has, despite numerous opportunities, never obtained the approval of the Secretary of the Treasury for the pension Plan amendment it has enforced against certain of its participants for the past ten years.

The Ninth Circuit Court of Appeals, in its *Shaw* decision, attempted to bring an end to this unauthorized course of conduct. Regrettably, the Plan took advantage of the limitations of the class certified in the *Shaw* case, and interpreted the Ninth Circuit's decision in that case as being one limited to the particular class of beneficiaries represented therein. In its decision in the case at bar, the Ninth Circuit has clarified in unequivocal terms the invalidity of the proposed amendment and has properly applied the statute of limitations set forth in 29 U.S.C. Section 1113 to limit the extent to which respondent Frank Meagher is entitled to recover for the difference between the reduced benefit payments he received and the amount he would otherwise have been entitled to. The Ninth Circuit's decision is not in conflict with the decisions of any other circuits, as the decisions cited in Petitioners' brief are inopposite to the facts and the law applicable to the case at bar. No adverse consequences will result from the Ninth Circuit's decision insofar as pension plan administration is concerned, provided that

those administrators do not attempt to follow a course of violation of ERISA as has occurred in the instant case.

For the reasons set forth herein, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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